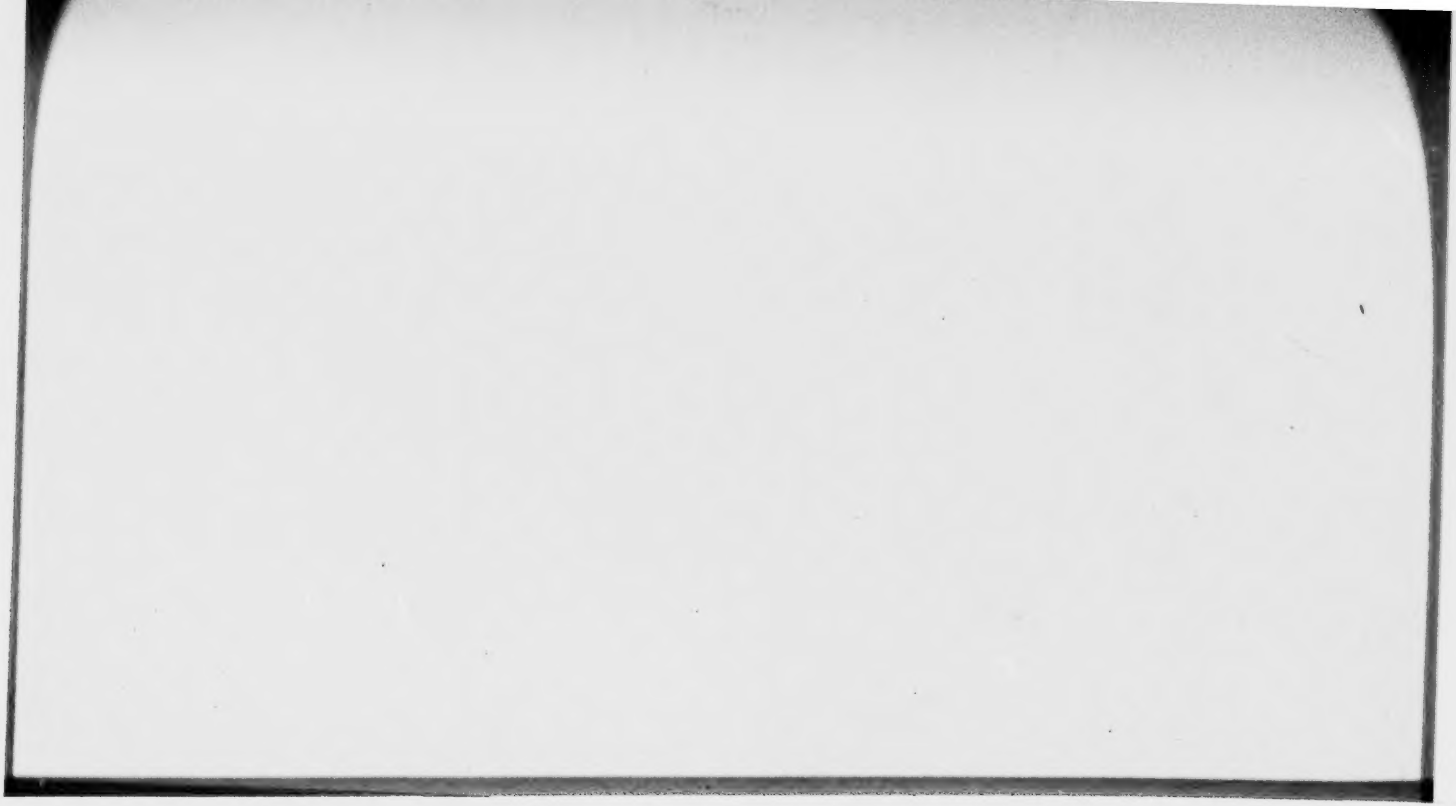

No. 337 and 339

Reply Br. of Atty. Gen'l

for U. S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

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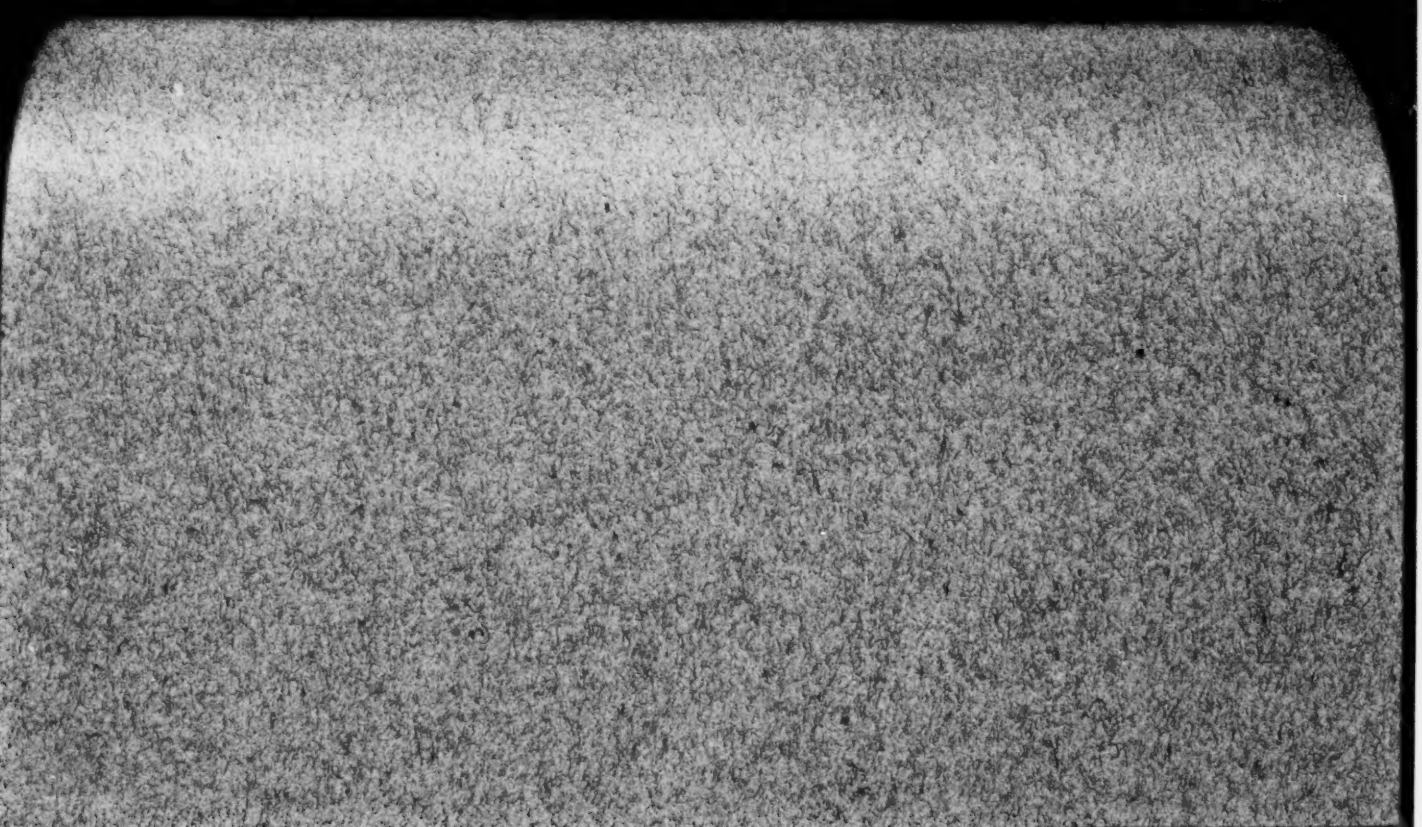
APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

CHARLES C. BINNEY,
Special Attorney.

JOHN W. GRIGGS,
Attorney General.



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APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

In considering the briefs* filed by the attorneys for the Choctaws and Chickasaws it is necessary to notice, first, certain of their statements of fact.

THE EVIDENCE OF THE MAPS.

The Paine brief (pp. 41–42) insists that the Canadian is "delineated with great accuracy" on De l'Isle's map of

*These briefs will be referred to as the Wilson brief, the Paine brief, etc.

1720 (Western Hemisphere, claimants' exh. No. 29), his map of 1739 (America, claimants' exh. No. 34), and Boehme's map of 1746 (America, claimants' exh. No. 35). It is a sufficient reply to ask the court to look at these maps, and to compare them with De l'Isle's maps of Louisiana of 1741 (claimants' exh. No. 28), and of Mexico and Florida of 1722 (claimants' exh. No. 30). Both of these were published *in the same atlas* as the maps of the Western Hemisphere and of America, and must be taken into consideration in answering the question of whether the latter can be properly understood as delineating the Canadian, and if they can not, surely Boehme's map can not, for it is obviously but a copy of De l'Isle's America.

The Paine brief (pp. 46–47) further contends that the small-scale maps of De l' Isle and Boehme must have been intended to show the Canadian (which De l' Isle's large-scale map manifestly did not show), because the Spaniards had long been at Santa Fe, and must have known the sources of both the Red and Canadian rivers, as they were not far off. The contention is easily answered. The source of the Red River was probably not known to the Spaniards, as it is really at 102° west longitude (Marcy's Exploration, Sen. Ex. Doc. No. 54, 32d Cong., 2d sess., p. 55, and map*; Hay's Rept. on Irrigation, Sen. Ex. Doc. No. 41, part 3, 52d Cong., 1st sess., 134, and map), some distance from Santa Fe. That

*As is well known, Marcy's longitude must be corrected by deducting about one degree. He puts the one hundred and third meridian at the source of the Red River, but it should be the one hundred and second.

of the Canadian was known, but its further course was *not* known (owing to the jealousy and practical hostility between the French and Spanish colonies, and the existence of savage tribes in between, both of which causes prevented intercourse), and it was supposed to be the source of the Red River, and was called Rio Rojo (Red River). (See note on Humboldt's Map, U. S. Exh. No. 1.)

The Paine brief (pp. 42–45) criticises the maps of Pike, Melish, Darby, Arrowsmith, and Pinkerton. The brief for the United States (pp. 59, 60) is not calculated, and was not intended, to create the impression that the English maps of Arrowsmith and Pinkerton were standards in at all the same sense as the American maps of Pike and Melish were. The Arrowsmith and Pinkerton maps were introduced merely to show that English geographers adopted Pike's delineation of the course of the Canadian, though not his longitude; and as long as we have Pike, the original authority, what his followers show (even if they may have been regarded as standards in their own country) is really unimportant. Pike's chart, published in 1810, was the standard *for the region between the Rocky Mountains and the Mississippi, south of the Missouri*, and it gives the source of the Canadian at about 100° west longitude, possibly three or four minutes to the west of that. Melish's map (of 1816, republished in 1818) was the standard *for the United States as a whole*, and it gives the source of the Canadian just east of 100°, locating its mouth and delineating its course more correctly than Pike did,

and making it a longer stream. Apparently something had been learned about it between 1810 and 1818. Darby's map never received the prominence that either Pike's or Melish's did, and hence can not be regarded as a standard, although there is reason to believe that Darby imparted to Melish the data from which the latter prepared this portion of his map.

Now, it is not contended for a moment that these maps, even the best of them, were either correct or harmonious with each other, but it is submitted, and with confidence, that they show what was believed at that time. Where they differ, they show that uncertainty existed; but in so far as they agree, they show general concurrence. And on two points they do agree, viz, that the Canadian did not rise appreciably west of the one-hundredth meridian, and that the streams which *we now know* as the sources of the Canadian River were the sources of the Red River. On both of those points of agreement they were wrong, but these errors were a part of the geographic belief of the day, and it was in that erroneous belief that the Quapaw treaty of 1818 and the Choctaw treaty of 1820 were made, ratified, and proclaimed, and it is in the light of that erroneous belief that they should be construed.

Apropos of the maps, the positive statement (Paine Wichita brief, p. 17) that Louisiana, when ceded, "extended from the Mississippi River westward to the Rio Bravo del Norte and Rocky Mountains," should not pass unnoticed. French maps so showed it, but Spanish geographers placed the boundary of New Spain nearly at the

Mississippi. Practically the whole territory between that river and the mountains was in dispute between the United States and Spain until 1819, and the final compromise involved no real surrender by the former nation.

THE TRUE FORM OF THE FIFTH STIPULATION.

On page 14 of the Wilson brief it is stated that the fifth stipulation or proposition submitted at Fort Smith in 1865 was submitted in the following form:

> 5. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein.

It is also stated that *in elucidation* of the stipulations the Commissioner addressed the Indians with regard to the said fifth stipulation, as follows:

> A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

Again, on page 26, the same brief purports to quote all the seven stipulations as submitted, giving the fifth in the same form as first given on page 14 and quoted above.

As appears more fully from the Paine brief (pp. 21–24), the first of the above forms, as distinguished from the second, is insisted upon as the actual form in which the stipulation was submitted to the Indians, because it is thought that the words "to be purchased for the use of

such Indians" mean a purchase *by the United States* for the use of Indians, and suggest such a transaction as, according to the same brief, the cession of the "leased district" constituted; while the second form of words obviously refers to such an acquisition of lands, *by Indian tribes themselves*, for a consideration to be paid *by them*, as the treaty of 1866 provided for in Articles XXX, XXXI, and XXXVII in regard to the land east of the "leased district." Of course the words "to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein" may fairly be understood as referring to a purchase by the Indians themselves as well as to a purchase by the Government, but if, in point of fact, the stipulation, as actually submitted to the Indians, was so worded as to refer to an acquisition of lands by the friendly Indians themselves, rather than a purchase by the Government for their use, and if, in consequence of its wording, the stipulation refers to such a transaction as was provided for in regard to the land east of the "leased district" rather than to the cession of the "leased district" itself, it is important to show what the wording of the stipulation really was.

Now, the official report of D. N. Cooley, as president of the southern treaty commission, dated October 30, 1865 (Secretary of the Interior's Report, 1865, pp. 480, 482), is as follows:

> On the second day * * * I addressed the Indians, in which I stated that the commissioners * * * had authorized me to submit the following statement and propositions as the basis on which

the United States were prepared to negotiate with them:

* * * * *

"A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government."*

The official report of the proceedings of the council, signed by Charles E. Mix, secretary, contains the minutes of the council on the second day, and recites the stipulations as submitted, giving the fifth stipulation in precisely the same words as those given in Mr. Cooley's report with the single addition of the word "now," making it read, "the friendly tribes now in Kansas," etc. (Secretary of Interior's Report, 1865, pp. 496, 503.)

Counsel for the Choctaws and Chickasaws have put in evidence, and have included in this record, a paper from the files of the Bureau of Indian Affairs, which counsel entitle "the printed address of the United States commissioners who attended the Fort Smith council of 1865." This paper gives the fifth stipulation in the same form

* The Paine brief (p. 22) refers to this report of Mr. Cooley as his "second report," but it is really entitled to be called his *first* report, as it is dated October 30, 1865, whereas his annual report as Commissioner of Indian Affairs, from which the brief had already quoted, is dated October 31, 1865. The fifth stipulation, as it appears in the first (miscalled "second") report, is incorrectly quoted in the Paine brief, the precise wording being as given above in the text. The misquotation, unless corrected, would create the erroneous impression that it was at least doubtful as to how the stipulation really had been worded.

in which it appears in the reports of Mr. Cooley, as president of the commission, and Mr. Mix, as secretary, following the latter report in using the word "now." (See Rec., 139, 142.) Apparently this paper is one of the "printed copies of the address" with which the agents were supplied for the purpose of fully explaining the stipulations to the Indians. (See Secretary of Interior's Report, 1865, p. 503.)

These three documents, all using the same language, would seem to show conclusively that the fifth stipulation, in the actual form in which it was submitted to the Indians as a stipulation, did not suggest any purchase of lands by the Government, from the Indians to whom the stipulation was presented, for the use of other Indians. The Paine brief, however (p. 23), seeks to avoid this conclusion by pointing to pencil memoranda on the back of the paper from the Indian Office, stating, among other things, that "the Gov'm't will insist upon purchasing a portion of their lands for the use of friendly Indians." (See also Paine Wichita brief, p. 27.) The genuineness of the printed paper itself is not disputed, but the pencil memoranda were duly objected to at the trial in the court below by the counsel for the United States and the counsel for the Wichita and affiliated bands "on the ground that they are not signed, and that it has not been proved who wrote them, when they were written, in what capacity the writer acted, or that they were ever shown to the Choctaw and Chickasaw commissioners." (Rec., 144.) This objection is now renewed, and it is submitted that these unauthenticated pencil memoranda can not now be received as evidence.

The Paine brief seeks to give an evidentiary standing to these memoranda by pointing out that they also contain a statement as to amnesty and the rights of Indians friendly to the United States, couched in language which also appears in a written paper, which was pinned to the printed paper, and bore the signature "R. M. Jones, chairman of the committee of Choctaw and Chickasaw Com'rs" (Rec., 143), and which same language is also found in article 8 of the unsigned treaty of 1865 and in Article V of the treaty of 1866. The paper signed R. M. Jones was also duly objected to, as it is not among the communications from the Choctaws and Chickasaws printed in the official records of the Fort Smith council, and there is no evidence of the constitution of the committee by whose chairman the paper purports to be signed, nor whether it was accepted by the whole body of Choctaw and Chickasaw commissioners and submitted officially by them to the United States commissioners. (Rec., 143, 144.)

It is submitted that this paper is not sufficiently authenticated to warrant its being received in evidence, but its reception or rejection is comparatively unimportant in the present connection, as those words which it contains in common with the pencil memoranda are also found in the treaty of 1866, as well as in the unsigned treaty of 1865.

The matter, then, stands thus: The pencil memoranda contain one statement which undoubtedly entered into the negotiations between the United States and the Choctaws and Chickasaws, and from this the latter's counsel contend that all that appears in those memoranda must also have entered into the negotiations. It

is submitted that the contention can not be sustained. No one knows who wrote those memoranda, nor when they were written, nor for what purpose, and the mere fact that they contain a statement which entered into the negotiations can not possibly entitle them to be received as evidence that other statements also entered into the negotiations. There is, therefore, no evidence that the fifth stipulation was ever submitted to the Choctaws and Chickasaws in the form now contended for by their counsel.

The form so contended for is taken from Mr. Cooley's annual report* (Secretary of Interior's Report, 1865, p. 202), wherein he did not recite the stipulations themselves, but gave an abbreviated statement of each, in words which he may have thought expressed the meaning, but which certainly did not do so at all fully or clearly. At all events, this rather ambiguous statement of the supposed substance of the fifth stipulation was not presented to the Indians at the Fort Smith council, and hence can have no bearing on the case; so that, it is

*The opinion of the court below is rather misleading in this connection, saying that the stipulation in this form was "stated by D. N. Cooley." (Rec., 402.) This is true, but it was not so "stated" to the Indians, but only to the Secretary of the Interior in Mr. Cooley's annual report. The discrepancy between the two forms of the stipulation is also said to "imply that no stenographic notes were taken during the sitting of the council" (Rec., 403); but even if no stenographic notes were taken, this fact does not impugn the accuracy of the reports of the president and the secretary, nor does it give any evidentiary value, for the purposes of this case, to the inexact language of Mr. Cooley's annual report.

submitted, the only form in which the fifth stipulation can be considered here is this:

> 5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government.

It is true that Mr. Cooley's annual report also states that "it was understood that delegates would, if necessary, visit Washington on behalf of any of the tribes owning lands in the Indian country which the Government might desire to purchase for the use of other Indians, so that, by properly accredited delegates, all necessary arrangements with the several tribes might be made." (Secretary of Interior's Report, 1865, p. 204.) This statement must be understood in connection with what is known to have taken place at the Fort Smith council. It is known that a stipulation for the acquisition of lands by the friendly tribes in Kansas and elsewhere was presented at that council, and also that the only treaty (other than the treaty of peace) which appears to have been presented at that council, viz, the unsigned treaty with the Choctaws and Chickasaws, had provided for such an acquisition of lands. It is not known that any proposition was made for the purchase of land *by the Government* from any of the tribes for the use of other Indians, and it is unlikely that there was any such proposition. The statement in the annual report is probably an inexact statement of what was understood at the council, viz, that the Government was to *supervise and approve* the proposed sales of land. It was proposed

that the Government should exercise a controlling influence in regard to all such sales, and hence the report refers to the matter as if the Government was itself to be the purchaser, but this is no evidence that the Indians were told that the Government wished to purchase land itself for the use of other Indians, and certainly can not outweigh the positive evidence as to the form in which the fifth stipulation was presented.

The Wilson brief (pp. 26, 27) insists that whatever the actual form of the fifth stipulation, it is "certain" that the agents of the United States impressed it upon these Indians that what the United States sought to accomplish was to procure the "right to locate other Indian tribes upon the territory so alleged to have been ceded by the third article of the said treaty of April 28, 1866," i. e., the "leased district," and that "it is equally certain that this is *all* that the Indians intended to give, and did actually give, to the United States as a result of these negotiations. The same contention appears in substance on page 32 of the same brief.

That anything of the sort was told the Indians, in connection with the fifth stipulation, there is no evidence whatever, and there is also nothing to show that they ever connected that stipulation with the cession of the "leased district," until years afterwards. That they were never actually called upon to admit other Indians to their lands east of the "leased district," in compliance with the fifth stipulation as actually embodied in the treaty of 1866, was merely due to the fact that the lands available for Indian colonization under the Creek, Seminole, and Cherokee treaties were more than sufficient.

THE FIFTH STIPULATION AS EMBODIED IN THE UNSIGNED TREATY.

The Wilson brief (p. 15) recites the fifth article of the unsigned treaty of 1865 as the one "mainly important" in connection with the fifth stipulation, and follows it with this paragraph (p. 16):

> *It is important to state* that there is nothing in the record or history pertaining to this case showing anything else as to the policy and purpose of the United States leading to the treaty of April 28, 1866, than the said fifth proposition and the said fifth article of said unsigned treaty.*

Had counsel said, "The said fifth proposition and the *fourth* article of said unsigned treaty," it might have been "important to state" their collective bearing upon the policy and purpose of the United States, and, at all events, *the statement would have come much nearer the truth.* How much truth there is in pointing to the fifth proposition and the fifth article of the unsigned treaty as the only evidence of that policy and purpose, while suppressing all reference to the *fourth* article, can be best shown by placing the stipulation and the fourth article

*The conclusion drawn from this "important" statement is found in the paragraph immediately following it in the Wilson brief, and also in the latter part of the paragraph ending on the tenth line of page 22 of the same brief.

side by side, as has already been done in the original brief for the United States (pp. 146, 147):

From the stipulations.	*From the unsigned treaty.*
5. A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by Government, or such as may be fixed by the Government.	ART. 4. The Choctaw and Chickasaw tribes of Indians hereby agree to open their country to the settlement of friendly Indians from Kansas and elsewhere upon such terms as may hereafter be agreed upon by the respective parties and approved by the Government, and the Government may settle such friendly Indians on a portion of said territory *east of the ninety-eighth degree of west longitude*, not necessary for the use of said Choctaw and Chickasaw tribes, as it may desire, not exceeding one-third of the whole remaining territory, for a fair and equitable consideration, to be fixed by the Government.

In view of the fact that the country "east of the ninety-eighth degree of west longitude" is *not* the "leased district," further comment on this point is unnecessary.

ARTICLES X AND XLV IN CONNECTION WITH THE CESSION.

The Wilson brief (pp. 33–35) makes the extraordinary contention that if the cession of the leased district were absolute, the provisions of Articles X and XLV as to the treaty obligations of the United States, and the rights, privileges, and immunities of the Choctaws and

Chickasaws, would be "inoperative and meaningless," and could only have been intended "to mislead and deceive the Indians to their prejudice." The bearing of these articles has been noticed in the original brief for the United States (pp. 32–34, 217). Each of these reaffirms the preexisting obligations, rights, etc., only so far as they are "not inconsistent" with the provisions of the new treaty. As far as these articles concerned rights in land, the Choctaws and Chickasaws, after ceding the "leased district," retained an undisputed title to 11,338,935 acres to which the articles could apply. How then these articles could be regarded as "inoperative," "meaningless," "useless," or calculated "to mislead and deceive," passes comprehension.

THE CHICKASAWS HAD NO SHARE IN THE RELINQUISHMENT OF 1855.

Passing now to what may more properly be regarded as questions of law, it may be noted that the Wilson brief (p. 72) seeks to show that the $800,000 paid to the Choctaws and Chickasaws under the treaty of 1855 (i. e., $600,000 to the Choctaws and $200,000 to the Chickasaws, in proportion to their respective interests in the "leased district") was not paid exclusively for the "lease," by contending that as the Chickasaws had, under the intertribal agreement of January 17, 1837 (7 Stats., 605), in proportion to their numbers, "all the rights and privileges of Choctaws," with certain specified exceptions, they must have had an interest in the land west of the one hundredth meridian, and at least half of the money paid them in 1855 must have been paid for

their relinquishment of that interest. This contention as to their "rights and privileges" proves too much. The agreement of 1837 was approved by the President and the Senate. This approval bound the United States to uphold all the provisions of the agreement, and to recognize that whatever the Chickasaws acquired thereby they acquired as fully and completely as if it had been granted them by the United States directly. Hence if the Chickasaws had, under this agreement, any interest whatever in the land west of the one hundredth meridian, they had precisely the same character of interest therein as had the Choctaws, and should have joined with them in the relinquishment, which they did not do, although they joined in the "lease." The reason why they joined in the latter, and not in the former is that they were joint owners of the land leased, but had no share in the Choctaw claim for land west of the one hundredth meridian. They received $200,000 as their proportionate share of the consideration paid *for the lease*, the Choctaws receiving $600,000 as their share.

THE EFFECT OF THE WORD "CEDE."

The Paine brief (pp. 1–5) seeks to support the contention that the provision in the treaty of 1866, for the cession of the "leased district," was couched in such uncertain and ambiguous terms as to necessitate a recourse to evidence *aliunde* for the purpose of explanation, by asserting that the word "cede" has no certain meaning; that it may mean a transfer of dominion only, or of public property, or of private property; that there is, in

short, something necessarily occult and mystifying about the word.

There is no reason whatever for treating the word "cede" as a term of mystification. It is the word regularly used by nations in transferring territory, and conveys whatever rights the nations have in such territory. It is more used in Indian treaties than any other word of conveyance, although, of course, when used of grants by the United States to Indians, it does not import the conveyance of more than a full Indian title. There can be no doubt that in article 2 of the treaty of 1820 it meant the conveyance of a full Indian title to the Choctaws, and there can be equally little doubt that in Article III of the treaty of 1866 it meant the reconveyance, by the Choctaws and Chickasaws, of whatever remained to them of that full Indian title, as to the "leased district," over and above what they had parted with by the "lease."

The suggestion (Paine brief, p. 5) that the guaranty of the treaty of 1855 may have made the land within the leased district, or a part of it, the private property of individual Choctaws and Chickasaws, and that this makes the meaning of the word "cede" uncertain, is wholly without foundation. The guaranty in the treaty of 1855 was made pursuant to the act of May 28, 1830, § 3 (4 Stats., 411), authorizing a guaranty to tribes or nations, not to individuals, so that the fact that the individuals of the tribe to whom the guaranty was given had an equal undivided interest in the tribal lands did not make that land private property in any sense whatever. If it had

had such an effect, moreover, the Choctaw and Chickasaw nations would have had no right of action for the land now in question, as the jurisdictional act only authorizes a suit upon a claim of those nations, and not upon any private claims whatever.

THE $300,000 AS A CONSIDERATION.

The Paine brief (p. 18), after attempting to show how the $300,000 could not be regarded as a consideration for the cession of the remaining interest of the Choctaws and Chickasaws in the "leased district," because in certain contingencies it might not have been paid to them, proceeds further to state that this sum "was to be paid to them *as a consideration* for the grant of forty acres of land, and of citizenship, including the right of suffrage, to each of their freedmen."

This bold assertion wholly overlooks the fact that the third stipulation required that the freedmen should be incorporated "into the tribes, on an equal footing with the original members [i. e., on an equality as to citizenship, land ownership, and suffrage], or suitably provided for," without the payment of any consideration whatever by the United States, and that this stipulation was literally complied with by the Creeks, Cherokees, and Seminoles without any compensation. That the Choctaws and Chickasaws were required to give their freedmen only forty acres apiece, instead of an acreage equal to what they would themselves be entitled to if their land were divided up, was a concession to them, and to that extent a departure from the strict terms of the stip-

ulation, but there is nothing whatever to show that any further departure therefrom was intended.

The assertion is also peculiarly inconsistent with the main argument of counsel for the Choctaws and Chickasaws. They contend that the cession of 1866 was for the sole purpose of Indian settlement because the fifth stipulation required land to be set apart for that purpose, and because the Creeks, Cherokees, and Seminoles were afterwards paid for all land not wholly used for that purpose. When it comes to the third stipulation, however, and its embodiment in the Creek, Cherokee, and Seminole treaties, counsel insist that the stipulation and treaties form no precedent whatever for the construction of the Choctaw and Choctaw and Chickasaw treaties.

If one of the stipulations, and its embodiment in the treaties with the other civilized tribes, is to influence the construction of the Choctaw and Chickasaw treaty, surely another of the stipulations and its embodiment in those treaties should have equal influence.

The position of the United States involves no such inconsistency. It is submitted that the fifth stipulation never was intended to apply to the "leased district," but to the land east of it, occupied by the Choctaws and Chickasaws; that the United States had no such rights in any of the Creek, Cherokee, or Seminole lands as it had in the "leased district;" that the Creek and Seminole cessions were expressly made for a particular purpose, and that the Cherokee treaty provided for a future acquisition of land by other Indian tribes, whereas the "leased district" was ceded in absolute terms. In other words,

the Creek, Seminole, and Cherokee treaties covered no cession at all similar to that of the "leased district," that which corresponded to the cessions in those treaties being provided for in Articles XXX, XXXI, and XXXVII of the Choctaw and Chickasaw treaty, just as the provisions for the freedmen in the latter treaty, though less stringent than those in the former treaties, undoubtedly corresponded to them.

In this connection attention may appropriately be called to the fact that in Indian treaties the United States has frequently retained a control over the disposition of the consideration money to be paid for a cession of lands, in order to secure justice to third parties at the hands of the Indians.

In the Ottawa treaty of 1836, $300,000 of the consideration money due from the United States were set apart for the payment of just debts against the Indians, to be examined by a commissioner. (7 Stats., 492.)

Under the treaty of February 18, 1837, with a band of Pottawatomies, the debts of the band were to be paid out of and deducted from the consideration due from the United States. (7 Stats., 513.) The same is true of a number of other treaties, with other bands of Pottawatomies, executed about the same time.

In the Sac and Fox treaty of 1836 the payment of certain liabilities of the tribes was a part of the consideration. (7 Stats., 518.)

By the Saginaw treaty of 1837, a portion of the fund created by the sale of lands was set apart, to be expended under the direction of the President, for various

specified purposes, including the payment of certain claims. (7 Stats., 529.)

In the Miami treaty of 1838, $150,000 were set apart for the payment of claims against the Indians. (7 Stats., 570.)

The above are but a few of the many instances in which the United States arranged that the consideration due from it for a cession of lands should be applied to various purposes, including the performance of obligations of the Indians toward third parties. It can not seriously be claimed that in any of those cases the absolute character of the cession made was at all affected by the control exercised over the consideration, and there is no more reason in the present case for claiming that the control retained over the $300,000 had any effect upon the cession.

The Paine brief, however, says (p. 60) that "article 3 itself obviously implies that one of the uses of the land was to be the settlement of freedmen removed from the Choctaw and Chickasaw nations," and this statement is practically repeated at the foot of page 68, and less positively in the Paine Wichita brief, at page 46. Now, the only part of Article III which could imply this must be the part which regulates the disposition of the $300,000, but counsel have always insisted that this part of the article implied that the cession was subject to the fifth stipulation, which relates to setting apart land for "the friendly tribes now in Kansas and elsewhere," and not to any provisions for freedmen. If the cession was, to any extent, for the use of freedmen, then it was certainly

not a cession in accordance with the fifth stipulation. In point of fact it was not intended to be restricted in any particular, and these obviously inconsistent contentions of counsel are the natural result of seeking to restrict what was intended to be unrestricted. Counsel are evidently uncertain in their own minds as to what the restriction really was.

As to the suggestion (Paine brief, p. 68) that "there was *no other district* available for [the freedmen's] colonization," except the "leased district," it is enough to point out that the Creek and Seminole cessions were expressly stated to be for the location of "other Indians *and freedmen*" upon the lands ceded.

The Paine Wichita brief (p. 25) states that the "leased district" was worth, "at the price fixed by the act of May 20, 1862 [12 Stats., 392], from $9,000,000 to $19,000,000." The latter figure is reached by computing on a basis of $2.50 per acre, but this price was only asked for "double minimum" lands, i. e., the alternate sections remaining to the Government after a grant of the intervening sections to a railroad. There were no such lands in the "leased district." Moreover, the fact that the ordinary price of public lands was $1.25 per acre is no warrant for saying that the lands in the "leased district" were worth that rate in 1866, as they were too near the heart of the Indian country to be desirable for white settlement at that time. They might possibly have been accepted as a gift, but would certainly have had no appreciable market value at a time when so much good public land away from the Indian country could still be obtained. In view of the fact that the United

States had paid $800,000 for a permanent "lease" of this district in 1855, $300,000 was no inadequate sum for a cession of the remaining interests of the Choctaws and Chickasaws in 1866.

AN ADMISSION BY THE CHOCTAWS.

The Paine brief (pp. 11–18) reviews the correspondence between the Secretary of the Interior, the Commissioner of Indian Affairs, and the Choctaw delegates in 1854–55, in order to attempt to show that some part at least of the $800,000 was not paid for the lease. This matter is sufficiently discussed in the brief for the United States (pp. 130–134), but it is as well to call attention to the letter of the Choctaw delegates of June 14, 1855, eight days before the treaty was executed. That letter, insisting on the limitations of the use to which the United States could put the district about to be "leased," contains this statement:

> The lease we consented to agree to was a limited one, viz, for the permanent settlement, within the country leased, of the Wichita and several alien tribes and bands now in our country—the Government to have control of them, but we still to retain jurisdiction over the country itself, with the right of settlement therein by Choctaws and Chickasaws as heretofore, as expressed and provided for in the convention. If the Government had the unrestricted right to bring in any and all Indians it pleased, the whole district might soon be filled up with a discordant, restless, and predatory population, which would endanger the frontier settlements of the Choctaws and Chickasaws, deprive us, practically, of our jurisdiction, and necessarily exclude Choctaws and

> Chickasaws from settling within the district, if they so desired. Such an arrangement would be *a virtual sale* of that portion of our country, to which we could under no circumstances submit. (Sen. Mis. Doc. No. 31, 34th Cong., 1st sess., p. 79.)

The cession of 1866, even when construed with the limitations contended for by counsel for the Choctaws and Chickasaws, entitled the United States to fill up the "leased district" with friendly Indians to the total exclusion of Choctaws and Chickasaws. The word "friendly," as used of Indians, is one of relative significance, and does not necessarily mean that none of them shall be "discordant, restless, and predatory," and at all events there can be no doubt that the cession of 1866, even with the limited construction contended for, "necessarily excluded the Choctaws and Chickasaws from settling within the district," and was therefore by their own admission "a virtual sale of that portion of [their] country." That which these Indians in 1855 declared would be a sale they now contend could not possibly have been a sale. The condition of being "unlettered" seems to carry with it some privileges.

THE PAYNE CASE IS NOT IN POINT.

The Wilson brief (pp. 38–39) refers to the case of *United States* v. *Payne* (2 McCrary, 289), and by extraordinary inadvertence the brief even refers to Payne as wishing to settle upon "these lands," which one would naturally suppose meant the "leased district." The case is not in point, however, as it did not concern the land

now in question, but only land that had been obtained from the Seminoles (not Creeks, as erroneously stated in the Wilson brief) in 1866 "in compliance with a desire of the United States to locate other Indians and freedmen thereon," as the Seminole treaty distinctly stated. No such language, nor anything equivalent thereto, was used in the Choctaw and Chickasaw treaty of 1866, and there is no warrant whatever for the statement in the Wilson brief (p. 58) that "the Seminoles as absolutely ceded these lands to the United States as did the claimants in this case."

A SUPPOSED ADMISSION AGAINST THE UNITED STATES.

The Commissioner of Indian Affairs, who presided in the negotiation of the treaty of 1866, in his report for 1866 (pp. 8–9), relating to that treaty, said:

> Four principal points came up for settlement, to wit: * * * Cession of lands by the several tribes to be used for the settlement thereon of Indians whom it is in contemplation to remove from Kansas. * * * The first tribe with which arrangements were consummated were the Seminoles. * * * The Indians cede the Government the entire domain secured to them by the treaty of 1856. * * * The next treaty in this series was made with the confederate nations of Choctaws and Chickasaws. * * * The Indians cede to the Government the whole of that tract of land known as the leased lands.

The cession by the Seminoles having been expressly made "in compliance with the desire of the United States to locate other Indians and freedmen thereon," i. e., on

the lands ceded, and the United States having, twenty-three years later, paid the Seminoles for an absolute cession of the same land, the Paine Wichita brief (p. 48) contends that the Commissioner meant that the Choctaw and Chickasaw cession was "in trust," because he used the same language in regard to it that he did in regard to the Seminole cession. A rather more natural explanation of the similarity of language would be that the Commissioner did not, in 1866, foresee what Congress would do in 1889, and understood that both cessions were absolute. Certainly there is nothing in his language to indicate that he believed that more money would have to be paid before the Seminole title to the land ceded by that tribe would be complete. Besides, the Commissioner was not undertaking to give an explanation of the treaties, but a mere summary of their contents, expressed in the briefest language, and in so doing he took up and summarized each section in turn. The statements as to the two cessions do not follow each other, but are thirty lines apart, and it is unreasonable to suppose that the Commissioner, in his brief summary of Article III of the Choctaw and Chickasaw treaty, had in mind the precise language previously used by him in summarizing the Seminole treaty. If the whole summary is looked at, and not merely counsel's extracts, the unreasonableness of his deductions will be made plain.

THE ACT OF 1891 NOT CONCLUSIVE.

As was stated in the former brief (pp. 185, 186), while the court below attached some importance to the statement in the act of March 3, 1891, §15 (26 Stats., 1025),

to the effect that the Cheyenne and Arapahoe Reservation, a portion of the "leased district," had been "ceded in trust" by the Choctaws and Chickasaws, it did not hold that statement to be conclusive in law as regards the Wichita Reservation. The counsel for the Choctaws and Chickasaws are not, however, satisfied with the position of the court below on this point, and now renew their contention that "by this statute [of 1891] the character of the cession of 1866 is definitely fixed," not merely as regards that portion of the "leased district" to which the act specifically referred, but all other portions as well. (Wilson brief, p. 46.) This remarkable contention is attempted to be based on the doctrines of construction *in pari materia* and of the effect of declaratory legislation, neither of which doctrines are, it is submitted, really applicable to the case.

The relevant portion of section 15 of the act of 1891 is as follows:

> And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians under Executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians; said lands have* been ceded in trust by article three of the treaty between the United States and said Choctaw and Chickasaw nations of Indians, which

*Apparently this word should be "having."

> was concluded April twenty-eight, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain two million three hundred and ninety-three thousand one hundred and sixty acres.

It is to be observed that the act of March 3, 1891, did *not* declare that the land in controversy in the present case had been ceded in trust, but merely that the Cheyenne and Arapahoe Reservation had been so ceded. That the declaration of a cession in trust was limited to those particular lands and referred to no others is too clear to call for any argument. It may perhaps be inferred that if the status of the land now in controversy had also come before the Fifty-first Congress, that particular Congress would have regarded it in the same way as it regarded the Cheyenne and Arapahoe Reservation, but the history of the bill introduced in that Congress to pay the Choctaws and Chickasaws for the whole leased district (see brief for U. S., p. 187) tends to rebut that inference, which is at best merely an inference, not a certainty. What is certain is that the Fifty-second Congress, in correcting an error of $48,800 in the computation of the amount due the Choctaws and Chickasaws by the act of March 3, 1891, added this proviso:

> *Provided, however*, That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe Reservation, dated March third, eighteen hundred and ninety-one, nor of this resolution, shall be held in

> any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "leased district." (Joint Res. of Jan. 18, 1893, 27 Stats., 753.)

It is also certain that the Fifty-third Congress in sending the present case to this court was very careful not merely to avoid using any language that could be taken as a declaration of trust, but even to refuse to admit that the claimants had any interest whatever in the land in question. As to this the language is unmistakable:

> That as the Choctaw and Chickasaw nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement, *which claim is controverted by the United States*, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine said claim of the Choctaws and Chickasaws, and to render judgment thereon. * * * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw nations have any claim to or interest in said lands or any part thereof. (28 Stats., 898.)

It being clear that Congress has carefully avoided making any declaration of trust as regards any portion of the "leased district" except the Cheyenne and Arapahoe Reservation, it remains to consider the effect of the act of March 3, 1891, upon the interpretation given to the cession of 1866 in general. Whether a treaty and a

statute should ever be considered *in pari materia* is doubtful at best, the one being an executive act and the other legislative. By what appears the most reasonable authority, a constitution can not be construed in the light of subsequent legislation. (Black, Interp. of Laws, 211.)

> Where enactments, separately made, are read *in pari materia*, they are treated as having formed, in the mind of the enacting body, parts of a connected whole, though considered by such body at different moments of time and under distinct and separate aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws and a consistent embodiment in a connected system. It is difficult to see how this principle can become the means of connecting, for the purpose of construction, clauses and provisions of a constitution established by an authority distinct from and independent of such legislative body and proceeding by different methods with the enactment of a strictly legislative body. As the two bodies can not in their nature unite to carry out a common purpose it is difficult to see how their independent enactments can be treated as if they had such capacity and intention. (*State* v. *Williams*, 13 S. Car., 546, 558.)

The same reasoning forbids the construction of a treaty in the light of a subsequent statute *in pari materia*. A treaty is the act of the President, made operative by the advice and consent of the Senate, while a statute is the act of both Houses of Congress, made operative by the approval of the President, and in some cases in spite of his disapproval. Although the two parties concerned in making treaties are also concerned, along with a third

party, in legislation, yet the capacity in which they act in the two cases is as distinct as if they were two different bodies. As to this matter of construction *in pari materia*, therefore, a treaty and a constitution appear to stand on the same ground.

Even were this otherwise, though, the effect which counsel for the Choctaws and Chickasaws seek to give to the act of 1891 interpreting the treaty of 1866 far exceeds the scope of the doctrine of construction *in pari materia*. The meaning of that treaty is a judicial question, with which Congress, acting in its legislative capacity, can not deal. Congress has power to make laws and within certain limits to dispose of the property of the United States, and hence its declaration, in the act of 1891, that the Cheyenne and Arapahoe reservation was held in trust was binding upon the United States, and the trust existed *from that date*, whether it had existed previously or not; but to declare what the treaty meant, or, in other words, what the law had been before that date, was beyond the legislative power of Congress. Such a declaration would have been merely an expression of the collective opinion of the individual members, to be respected just as much as, but no more than, the collective opinion of an equal number of equally intelligent men.

As early as *Ogden* v. *Blackledge* (2 Cr., 272), the Supreme Court held it superfluous for counsel to argue that "to declare what the law is or has been is a judicial power; to declare what the law shall be is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial;" and this doctrine has never been departed

from by the courts, in spite of what seem to have been legislative attempts to override it.

> In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect that is due to them as an expression of the opinion of the individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it. (*Salters* v. *Tobias*, 3 Paige, N. Y., 338, 344.)
>
> The legislature can hardly change the effect of an existing enactment or grant by giving legislative definitions or constructions. Regarded as *prospective*, such enactments may govern *for the future* the legislation to which they apply, but they can not operate retrospectively to change the force or construction of statutes already passed as to any right or interest already vested under them, though we can recall instances where this seems to have been attempted. (*State* v. *Canterbury*, 28 N. H., 195, 218.)

It must therefore be considered as established that if a court holds that a later statute puts an erroneous construction upon a prior one, such construction not only may, but must, be disregarded, except in so far as the later statute may make some positive enactment for the future. (*Koshkonong* v. *Burton*, 104 U. S., 668; *United States* v. *Chong Sam*, 47 Fed., 878, 886; *Oakland* v. *Water Front Co.*, 118 Cal., 160, 171; *People* v. *Supervisors*, 16 N. Y., 424, 432; *Smith* v. *Westerly*, 19 R. I., 437; Black, Interp.

of Laws, 371; Sutherland, Statutory Constru., § 229, and cases there cited.)

As was said in *Postmaster-General* v. *Early* (12 Wheat., 136, 148), "a mistaken opinion of the legislature concerning the law *does not make the law*." The opinion in that case further stated that if the mistake of the legislature was "manifested in words competent to make the law in future," it would have that effect, but of course, even in such a case, such an effect can only result in regard to the particular matter with which the law undertakes to deal. In the present case, it is submitted, Congress did not even "make the law in future" as regards the character of the title of the United States to the Cheyenne and Arapahoe Reservation. The only positive enactment is that a certain sum of money shall be paid to the Choctaws and Chickasaws on account of certain lands, and in this enactment there occurs the explanatory statement (indicating the reason which induced Congress to make the appropriation) that the lands had been ceded in trust. This was a statement of the belief of Congress, not an enactment which was intended to control the opinions of courts; and at all events it can not be stretched into an enactment in regard to any land outside the Cheyenne and Arapahoe Reservation.

The doctrine as to the construction of statutes *in pari materia*, to which the authorities cited in the Wilson brief (pp. 46–47) refer, had really nothing to do with the case. It is a doctrine for the guidance of courts, but can not operate to control them against their own judgment. If the meaning of the legislature, as expressed

in a subsequent act, throws light upon the probable meaning of a prior act, a court should not disregard such light, but where a legislature, without throwing any light whatever upon a prior law, simply states that it chooses to construe it in a particular way, such declaration is in no way binding upon a court.

As to the other authorities relied on in this connection, what is referred to in Sutherland, § 231, and the cases there cited, is the declaration of the purpose or meaning of an act, given in the act itself, or a general rule of interpretation, given in a code or other statute. The rule stated in Endlich, § 365, admits that a legislative interpretation can only act prospectively. *Whitney* v. *Robertson* (124 U. S., 194) states that a treaty can be modified or superseded by subsequent legislation, as, it is submitted, was done in the case of the Cheyenne and Arapahoe Reservation by the act of 1891, but that has nothing to do with the interpretation.

The Barnes brief (p. 149) contends that the act of 1891 must control the interpretation of the treaty of 1866 because Sedgwick, in his Construction of Statutory and Constitutional Law, pp. 386–387, laid it down that "whenever the nation by its properly constituted agents has declared its interpretation of a treaty, that interpretation becomes binding on the courts."

All that this statement can reasonably be held to mean is that when the properly constituted agents of the nation interpret a treaty in regard to any matter which is not judicial in its nature, and hence is outside the jurisdiction of the courts, and that interpretation is not subsequently departed from, it is binding on the courts as

to all judicial questions arising in regard to the matter as to which the interpretation was given.

The authority cited for Sedgwick's statement is the opinion of Marshall, C. J., in *Foster* v. *Neilson* (2 Pet., 253, 307), but the rather garbled quotation which Sedgwick gives must be understood with reference to the preceding paragraph, reading as follows:

> In a controversy between two nations concerning national boundaries it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own Government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they can not adjust their differences peaceably the right remains with the strongest. The judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided, and its duty commonly is to decide upon individual rights according to the principles which the political departments of the nation have established. If the course of the nation has been *a plain one*, its courts would hesitate to pronounce it erroneous.

The above statement clearly confines the binding force of the legislative interpretation of a treaty to cases where the question before Congress was purely political and its course of action in regard thereto has been plain and consistent. Hence it was no departure from the doctrine of Marshall, C. J., when this court said, in 1867:

> Congress has no constitutional power to settle the rights under treaties, except in cases purely political. The construction of them is the peculiar province of the judiciary when a case shall arise between individuals. (*Wilson* v. *Wall*, 6 Wall., 83, 89.)

The class of judicial questions to which the doctrine of *Foster* v. *Neilson* applies comprises, therefore, those whose decision necessarily depends upon decisions given by the legislative or executive branches of the Government in the performance of their exclusive duties, and which decisions have subsequently been adhered to. The mere fact that a question concerns the Government of the United States does not make it political in the sense to which Marshall, C. J., referred in *Foster* v. *Neilson*, nor is it made so by the mere fact that Congress acts without leaving the matter to the courts.

In the Cheyenne and Arapahoe case Congress acted, while in the present case it has given jurisdiction to a court, but that does not make the question of a cession in trust a political question in the one case and judicial in the other; and the fact that the present case comes to this court by a special act can not make the question any less judicial than if the general jurisdiction of the court below, itself the child of Congress, had been broad enough to cover such a suit.

A political question, within the doctrine of *Foster* v. *Neilson*, is therefore one to which, from the nature of things, the jurisdiction of a court can not extend, and hence the question whether the Wichita Reservation was ceded in trust can not be political, and this being so, the similar question as to the Cheyenne and Arapahoe Reservation could not have been political, and the action of Congress in regard thereto can not come within the rule of *Foster* v. *Neilson*.

Even were this otherwise, the fact would remain that "the course of the nation," to use Marshall's words, has

not "been a plain one." In 1891 Congress said that the lands within the Cheyenne and Arapahoe Reservation had been ceded in trust by the treaty of 1866, while in the joint resolution of January 18, 1893, and in the jurisdictional act, Congress has expressly refused to admit that the claimants have any rights whatever in any further portion of the leased district. As it is manifest that prior to the act of 1891 the claimants' rights were the same as to every portion of the leased district, Congress has plainly twice repudiated its declaration of 1891, so that the latter can not now be binding upon this court, whatever might have been the case had the interpretation been adhered to.

Moreover, the declaration in the act of 1891 is expressly confined to particular lands, viz, the Cheyenne and Arapahoe Reservation, not an acre of which is involved in the present case, whereas in *Foster* v. *Neilson* the land in controversy was within a district as to which Congress had acted. Had Congress only acted with reference to some other part of the disputed territory, the question would have been different.

The Paine brief (pp. 28, 29) relies on the supposed legal effect of the act of 1891 as an acknowledgment of a trust by a trustee. Granting all that the authorities cited state, there is no authority for holding that when the one who has made such an acknowledgment realizes that he was mistaken, he can not afterwards cancel or withdraw the acknowledgment, or declare that it shall not be taken to affect any other property than that in regard to which it was specifically given.

THE BEARING OF TEXAS AND PACIFIC RAILWAY CO. V. MARSHALL.

The Wilson brief (pp. 73, 74, 86) contends that because the case of *Texas and Pacific Railway Co.* v. *Marshall* (136 U. S., 393) and other authorities cited in the brief for the United States (p. 266) hold that the word "permanent" does not mean "lasting forever," therefore the cession of 1866, being understood to be for the permanent settlement of friendly tribes, could not in any event have been intended to pass all the interest of the Choctaws and Chickasaws in the lands ceded. This contention wholly perverts the doctrine of the authorities cited. They hold that if an establishment is located in a certain place with the intention of keeping it there, and it is subsequently removed because a change of circumstances makes it undesirable to keep it there, this does not violate a contract for its permanent location, nor require a return of land or money given in consideration of such permanent location. Applying this doctrine to the cession of 1866, supposing that to have been made for the permanent settlement of friendly Indians, that cession must be held to have been permanent, so that the Choctaws and Chickasaws have received the full consideration for their cession and have no right to ask that the land or its proceeds be returned to them, even if a change may now take place in the precise uses to which the land is put.

It is true that in *Texas and Pacific Railway Co.* v. *Marshall* the court further stated that even if the railway company, by removing its shops from Marshall, had broken the contract for their permanent location there,

the remedy must be at law and not in equity, but this view of the court can not weaken the authority of this case upon the fundamental point on which it was decided.

THE CLAIM TO COMPENSATION FOR LAND ALLOTTED TO THE WICHITA AND AFFILIATED BANDS.

In view of the fact that the Choctaws and Chickasaws insist on the right to compensation even for the land allotted to the Wichita and affiliated bands, it may be as well to point out that a recognition of such a claim would be utterly unprecedented. In the settlements with the Creeks and Seminoles, who ceded lands expressly for Indian settlement, and with the Cherokees, who had sold land to other Indian tribes, nothing whatever was paid for lands wholly occupied by Indians, while in case of partial occupation the price paid was reduced in proportion to the extent to which the land was actually occupied by Indians. All this is set out in full in the original brief for the United States, pages 222 to 228.

Even in 1891, when Congress saw fit to recognize the Choctaw and Chickasaw claim to the Cheyenne and Arapahoe Reservation, no payment whatever was made for the allotments to the Cheyennes and Arapahoes, the acreage for which the Choctaws and Chickasaws were paid being what remained "after deducting allotments as provided by said [Cheyenne and Arapahoe] agreement." (26 Stats., 1025.)

From the standpoint of the United States, the mere fact that a part of the claim of the Choctaws and Chickasaws is unsupported by any precedent, even in the lavish

generosity of a Congress legislating in the last hours of a session, with no time left for a searching inquiry into facts or law, is not specially important, the whole claim being, it is submitted, without legal or equitable foundation; but this unprecedented feature of the claim is worth noticing, as a sample of the spirit of the whole claim.

In this connection it should not be overlooked that although the court below laid great stress upon the precedents set by the dealings with the Creeks, Cherokees, and Seminoles (Rec., 421–423), the decree is much more liberal to the Choctaws and Chickasaws than would be warranted by those precedents, supposing them to be such. In the dealings with the Creeks, Cherokees, and Seminoles, full credit was given for every dollar paid by the United States, even for cessions which were unqualifiedly in trust. (See original brief for U. S., pp. 223–227.) In the present case the Wichita Reservation is very nearly one-tenth of the whole "leased district," so that, as $1,100,000 were paid for that district, about $110,000 should be deducted from whatever sum might be due under the decree of the court below, even should this court permit that decree to stand in other respects.

CHARLES C. BINNEY,
Special Attorney.

JOHN W. GRIGGS,
Attorney-General.

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Nos. 337, 338 and 339.

Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk.

Answer of Appellees to motion to

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed Oct. 16, 1899.

THE UNITED STATES, *Appellant*, *vs.* THE CHOCTAW NATION and THE CHICKASAW NATION.	No. 337.
THE WICHITA AND AFFILIATED BANDS OF INDIANS, *Appellants*, *vs.* THE CHOCTAW NATION and THE CHICKASAW NATION and THE UNITED STATES.	No. 338.
THE CHOCTAW NATION and THE CHICKASAW NATION, *Appellants*, *vs.* THE UNITED STATES and THE WICHITA AND AFFILIATED BANDS OF INDIANS.	No. 339.

Answer of The Choctaw Nation to the Motion of The United States to Remand These Cases to the Court of Claims.

The Choctaw Nation, answering the motion above mentioned to remand these cases to the Court of Claims, says:

That, as will be seen by reference to said motion, its purpose, in substance, is to have this court remand the above-entitled cases to the Court of Claims, for the purpose of

having inserted in the record photolithographic copies of certain maps in said motion mentioned on file in the Library of Congress.

This motion to remand is resisted by the Choctaw Nation for the following reasons:

1. By reference to the record, it will appear that the questions in the case, among others, were whether or not the lands in controversy were embraced in the cession by the United States to the Choctaw Indians by the treaty of 1820. The Wichitas, as will appear by the record, claimed that they held these lands by Indian occupancy. This made it necessary to produce in evidence to the court, in some form or other, the maps relating to this region of country, and accordingly the Choctaws and Chickasaws, in order to meet this portion of the case, proceeded to procure and place before the court that part of the maps that covered this region of country.

For this purpose, the maps themselves not being available (as will appear by reference to the answer of the Chickasaws), H. E. Paine, Esq., counsel for the Chickasaws, prepared tracings of the maps in question, in so far as they affected this case, omitting from such tracings such parts of the maps as had no possible relevancy to the matter in controversy, and, as will appear by the record, on the 25th of April, 1896, and on the 23d of July, 1896, his depositions were taken, in which, among other things, he testified that he had made these tracings, that they were accurate, and the tracings themselves were attached as exhibits to his depositions.

While it is true that counsel for the United States objected to these tracings when the depositions were taken, and also objected to them on the trial, it is also true that when the objection was made in court inquiry was made of counsel for the United States by the court whether it was claimed that there was any inaccuracy in these tracings,

with the result that these tracings were, by common consent, placed in the hands of Mr. Walker, of counsel for the Wichitas, for the purpose of comparing the tracings with the originals, on file in the Library of Congress, and at a subsequent date and while the case was still on trial he stated in open court, in substance, that he had made the examination and found no material or substantial difference between the tracings and the originals. The precise language used by him cannot be recalled after the lapse of about a year and eight months, but this is substantially what occurred.

The trial proceeded thereafter without any controversy in regard to this matter. Counsel for the United States, although Mr. Paine's depositions had been on file from about the dates above given until the trial began, did not offer to produce said maps nor any copies thereof, photolithographic or otherwise. He did not show or attempt to show that there was anything material omitted from such tracings, and the attention of the court is now called to the fact that he does not by his motion show wherein he claims the tracings were misleading when separated from the rest of the maps not traced. He had ample opportunity to bring the entire maps before the court by photolithographic copy, tracing, or otherwise, but did not make any offer to do so. He contented himself with objecting to the competency of a tracing proved to be accurate by the testimony of Mr. Paine.

It is true that counsel for the United States asked the counsel for the claimant to enter into a stipulation in regard to the printing of reproductions of the original maps. What he desired was that the tracings should be omitted from the record and the reproductions, by photolithography, substituted in the place of such tracings. Counsel for the claimant Indians declined to agree to any change in the record, and for the reason, first, that these tracings were the

subject of the testimony of Mr. Paine and were exhibits to his depositions; and, second, because the proposed reproductions were not in fact offered in evidence on the trial; and, third, because they did not deem it proper to change the record so as to present therein what had not been presented to the Court of Claims.

Counsel for the claimant Indians have only insisted that the record as made in the Court of Claims shall be printed without change. They have not insisted that this court shall be confined to the tracings. They have not insisted, and do not now insist, that this court cannot regard as evidence the originals from which the tracings were made or make any use of reproductions of the originals. If they are documents of which judicial notice may be taken, they are available to counsel for the United States and the Wichitas and the affiliated bands in argument; but whether judicial notice will be taken or not, counsel for the Choctaws, on argument, will not make any objection to the use by counsel for the United States and for the Wichitas and affiliated bands of any photolithographic copies that counsel for the United States may produce that the court may deem proper, notwithstanding the want of any proof of their accuracy.

Counsel for the Choctaws do not object to this court making an order to print anything designated in the motion for use on the hearing of these cases, but does object to remanding the cases to the Court of Claims for the purpose indicated in said motion, and mainly for the reason that it involves unnecessary delay in the preparation and hearing thereof.

JEREMIAH M. WILSON,
Of Counsel for the Choctaw Nation.

DISTRICT OF COLUMBIA, *ss*:

Jeremiah M. Wilson, being first duly sworn, on his oath says that he is counsel for the Choctaws in the above-entitled cases, and that the matters of fact stated in the foregoing answer are true as he verily believes.

JEREMIAH M. WILSON.

Sworn to and subscribed before me this 14th day of October, A. D. 1899.

[SEAL.] EDMUND VAN DYKE,
Notary Public.